

CRIMINAL REVISION.

Before Mr. Justice Dunkley.

THE KING *v.* BA KYAW.*

1940

Mar. 13.

Criminal Procedure Code, s. 565—Sentence of whipping—Accused not sentenced to imprisonment—Requirement of reporting residence illegal—Report to a certain person at a certain place—Irregularity.

The provisions of s. 565 of the Criminal Procedure Code have no application where the accused is not sentenced either to transportation or to imprisonment. Consequently, it is illegal for the magistrate when he has passed only a sentence of whipping, to require the accused to report his residence or change of residence.

An order to report residence to a designated person at a named place in the order is not contemplated by s. 565 and the rules framed thereunder.

Emperor v. Fulji Ditya, I.L.R. 35 Bom. 139; *King-Emperor v. Etwaru Dome*, I.L.R. 15 Pat. 44, referred to.

DUNKLEY, J.—The case of the respondent has been taken up on revision because the order which the trial Magistrate has passed, purporting to act under section 565 of the Code of Criminal Procedure, is illegal.

The sentence of the Magistrate in this case reads as follows :

“I direct that the said Ba Kyaw do suffer 20 lashes of whipping under section 3 of the Whipping Act.

Under the provisions of section 565, Criminal Procedure Code, I further direct that the said Ba Kyaw do report his residence and change of residence to the P.S.O. No. 17 Police Station, Mandalay, for two years after he has suffered the sentence.”

This order under section 565 of the Criminal Procedure Code is irregular, in that it orders the respondent to report his change of residence to a person named in the order at a fixed place mentioned in the order, and that is not an order which is contemplated by

* Criminal Revision No. 1607A of 1939 from the order of the 1st Additional Special Power Magistrate of Mandalay in Criminal Regular Trial No. 157 of 1939.

1940
THE KING
v.
BA KYAW.
DUNKLEY, J.

section 565 of the Criminal Procedure Code or the rules framed thereunder in Judicial Department Notification No. 33, dated the 24th January, 1902. It is, in fact, a type of order which was formerly legal under the Burma Habitual Offenders Restriction Act which has been repealed. Such an order cannot be made under the provisions of any section of the Criminal Procedure Code.

The order is, furthermore, illegal for another reason. Section 565 (1) says, in brief, that when a person has been convicted of one of certain offences, and is subsequently again convicted of a similar offence, the Magistrate, at the time of passing a sentence of transportation or imprisonment on such person, may also pass an order that the convict shall notify his residence and change of or absence from such residence after release in the manner provided by the remaining parts of the section. In this case the sentence passed on the respondent was a sentence of whipping and not a sentence of transportation or imprisonment, and, therefore, section 565 (1) had no application at all.

In the cases of *Emperor v. Fulji Ditya* (1) and *King-Emperor v. Etwaru Dome* (2) it was held that an order under section 565 of the Criminal Procedure Code can only be made at the time of passing a sentence of transportation or imprisonment upon the convict, and it cannot be made where the Court, instead of passing that sentence, passes a sentence of whipping. Consequently, the order of the Magistrate, purporting to be made under section 565 of the Criminal Procedure Code, was illegal, because the provisions of that section had no application in view of the fact that the respondent was not sentenced either to transportation or to imprisonment, and the order is, therefore, set aside.

(1) (1910) I.L.R. 35 Bom. 139.

(2) (1935) I.L.R. 15 Pat. 44.